

NATIONAL MINES CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-57

Decided September 23, 1988

Petition for discretionary review of a decision of Administrative Law Judge Joseph E. McGuire denying petition for review of notices of violation and assessing civil penalties. CH 5-19-P.

Affirmed in part and affirmed as modified in part.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

OSMRE properly issues a notice of violation for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that water used to control dust on the permittee's access road was carrying suspended solids in excess of the allowable limit set by 30 CFR 717.17(a)(3) off the permit area and into a river.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness

An assignment of 15 points for probability of occurrence is proper where the violation cited is failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow and the evidence shows that suspended solids in amounts substantially greater than allowable limits were being carried off the permit area and into a nearby river.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness

The Board will reduce the points assigned for extent of potential or actual damage for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that, while damage would extend outside the permit area, there was no evidence as to the extent or duration of potential or actual damage.

4. Board of Lands Appeals--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount

When the Board of Land Appeals reduces the number of points assigned for a violation to fewer than 30, and that violation is not contained in a cessation order, in accordance with 30 CFR 723.12(c), the assessment of a civil penalty is discretionary and the factors in 30 CFR 723.13(b) are to be taken into consideration.

5. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

As a general rule, where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed by the permittee's operations, the discharge from the sedimentation pond must meet the effluent limitations of the regulations. However, where a person charged with a violation of the effluent limitation can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations, the person may escape responsibility for the violation. However, a failure to provide such evidence will result in an affirmation of the violation.

APPEARANCES: Joseph M. Karas, Esq., and Chester R. Babst III, Esq., Pittsburgh, Pennsylvania, for petitioner; Lynne N. Crenney, Esq., Office of the Field Solicitor, Pittsburgh, Pennsylvania, and Angela F. O'Connell, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

By order dated November 7, 1986, the Board granted the petition of the National Mines Corporation (National Mines) for discretionary review of a September 11, 1986, decision of Administrative Law Judge Joseph E. McGuire denying National Mines' petition for review of notices of violation (NOV) Nos. 82-l-36-2 and 82-l-36-3 issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) and assessing civil penalties in the amount of \$3,600.

This case was initiated when OSMRE inspector Thomas F. Koppe issued the two NOV's to National Mines on April 16, 1982, for violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. || 1201-1328 (1982), at National Mines' underground mining operations, known as the Isabella Mine, in Fayette County, Pennsylvania. The NOV's were issued following an inspection of the Isabella Mine on March 29 and 31, 1982, by Koppe. He issued NOV No. 82-l-36-2 for failure to maintain two roads, the access road from the scalehouse to the preparation plant and the access road to the scrap yard, so as to prevent additional contributions of suspended solids to the streamflow in the Monongahela River, in violation of 30 CFR 717.17(j)(1) (Respondent's Exh. 27).

Koppe issued NOV No. 82-l-36-3 for discharges from sedimentation pond 004 for the active refuse pile which failed to meet the numerical effluent limitations for pH and total manganese, in violation of 30 CFR 717.17(a) (Respondent's Exh. 39). In each case, the NOV required certain

abatement measures to be undertaken immediately and completed by June 16, 1982. 1/ Subsequently, on June 17, 1982, Koppe modified the two NOV's to require completion of abatement by July 16, 1982. See Respondent's Exhs. 28, 40. Koppe granted the extensions of time in order to permit a subcontractor hired by National Mines to complete the necessary work.

By notices dated April 30, 1982, the Assessment Office, OSMRE, informed National Mines that OSMRE proposed to assess civil penalties of \$1,500 and \$1,400, for NOV No. 82-1-36-2 and NOV No. 82-1-36-3, respectively. See Respondent's Exhs. 29, 41.

On October 7, 1983, National Mines filed a petition for review of the proposed assessment of civil penalties in connection with the two NOV's, which petition was amended on February 22, 1984. 2/ In conjunction with filing its petition for review, National Mines paid the proposed civil penalties. On September 18, 1985, Judge McGuire conducted a hearing on the petition. Following the close of the hearing, Judge McGuire issued his

1/ NOV No. 82-1-36-2 required National Mines to prevent additional contributions of suspended solids to the Monongahela River by, among other things, constructing sumps, redirecting runoff to existing ponds and/or cleaning and removing silt from ditch lines. NOV No. 82-1-36-3 required National Mines to prevent discharges exceeding 4.0 milligrams per liter (mg/l) total manganese and a pH range not greater than 9.0 and less than 6.0 by, among other things, installing, operating and maintaining adequate treatment facilities.

2/ As amended, National Mines' petition for review challenged the amount of the proposed assessments, asserting that OSMRE had assigned an incorrect number of penalty points and failed to assign any good faith points. The petition also challenged the fact of the violation cited in NOV No. 82-1-36-3 on the basis that the violative discharges from the sedimentation pond were not caused by National Mines' active refuse pile, but prior surface mining operations of the Luzerne Coal Corporation (Luzerne) on reclaimed land adjacent to the permit area.

September 1986 decision from which National Mines (hereinafter petitioner) has been granted a discretionary right of review, pursuant to 43 CFR 4.1270. For the sake of clarity, we will review the two violations cited by OSMRE separately, both as to the fact of violation and the proper civil penalty, if any.

Failure to Maintain Access Road

At the time of his March 29 inspection, OSMRE Inspector Koppe testified that he observed turbid water entering the Monongahela River. He testified that he determined the water was originating from a 4-inch hose laid along the side of the access road near the scalehouse and that the purpose of the system was to water down the road to control fugitive dust (Tr. 29-30, 82, 85-86). Koppe testified that he traced the water down the access road towards the preparation plant, around a bend in the road into a ditch along the access road to the scrap yard, from the ditch into a culvert which passed under the access road, from the culvert into an unnamed tributary running parallel to the river, and from that unnamed tributary into another unnamed tributary which then flowed into the river (Tr. 31). The flow of water is indicated in green on a sketch map of the Isabella Mine prepared by Koppe (Respondent's Exh. 1) and is documented in photographs taken by Koppe (Respondent's Exhs. 2-16). See Tr. 32-40.

Koppe also testified that he took four water samples, using the grab method (Tr. 30, 41). Sample No. 1 came from the ditch along the access road to the scrap yard (Tr. 35; Respondent's Exh. 17). A test revealed it

contained 6,785 mg/l of suspended solids (Tr. 53; Respondent's Exh. 23). Koppe took sample No. 4 from the first unnamed tributary where it intersected the second unnamed tributary (Tr. 38; Respondent's Exh. 20). It tested at 759 mg/l of suspended solids (Tr. 57; Respondent's Exh. 26). Sample Nos. 2 and 3 were taken, respectively, where the second unnamed tributary entered the river and upstream in the river from that point (Tr. 39; Respondent's Exhs. 18, 19). They contained 343 mg/l and 16.1 mg/l of suspended solids, respectively (Tr. 56-57; Respondent's Exhs. 24, 25).

Koppe testified that, following receipt of the test results, he issued NOV No. 82-I-36-2 during an April 16, 1982, follow-up inspection (Tr. 58).

Petitioner offered the testimony of James R. Bearden, who at the time of issuance of the NOV was a mining engineer employed by petitioner. Bearden testified that the access road near the scalehouse was maintained by periodic scraping and, when necessary, a "sprinkling type system" (Tr. 151). Bearden described the system as consisting of a 1-inch hose laid along the side of the road with a flattened pipe or nozzle inserted in the end which sprayed water on the road, the hose being connected to a fire hydrant which was just barely opened 3/ (Tr. 151-53). Bearden testified that the system was unmanned (Tr. 177), but that it worked "fairly well" to control fugitive dust (Tr. 154). He also testified that OSMRE's water samples could have been influenced by drainage other than that which originated at the hose, viz., drainage from sedimentation pond 005 which entered the first unnamed tributary, as well as drainage from sedimentation pond 004, drainage

3/ Koppe was asked whether he could recall a nozzle at the end of the hose that he observed. He replied: "Not offhand" (Tr. 82).

around that pond, and drainage from the town of Isabella, all of which entered the second unnamed tributary (Tr. 158). Following receipt of the NOV, Bearden testified that petitioner ceased using the sprinkler-type system and, on June 15, 1982, began to employ, as an alternative means of controlling fugitive dust, a water tank mounted on a truck which dispersed water on the access road (Tr. 159-62).

After reviewing all of the evidence adduced at the hearing with respect to NOV No. 82-1-36-2, Judge McGuire concluded that the NOV was properly issued because petitioner had failed to maintain the access road so as to prevent the additional contribution of suspended solids to streamflow. Judge McGuire particularly relied on the fact that OSMRE's sample Nos. 1, 2, and 4 showed suspended solids in water running down from the access road near the scalehouse and entering the Monongahela River, in amounts which exceeded the maximum allowable concentration set forth in 30 CFR 717.17(a)(3), i.e., 70 mg/l (Decision at 5-6).

[1] The regulation which petitioner was cited as violating is 30 CFR 717.17(j)(1), which provides that access roads in the case of underground mining

shall be constructed, maintained, and reclaimed so as to the extent possible, using the best technology currently available, prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable State or Federal law.

We conclude that the evidence clearly establishes that petitioner violated this regulation. Petitioner's sprinkler-type system in use on March 29, 1982, was part of its maintenance activities undertaken on the access road near the scalehouse. Koppe testified that turbid water could be visually traced from the hose laid along the side of that road eventually into the Monongahela River. See Tr. 29-30. Water sample No. 1 taken in the drainage ditch along the access road to the scrap yard and sample No. 4 taken from the first unnamed tributary just before its intersection with the second unnamed tributary both exhibited high concentrations of suspended solids, far in excess of the allowable limit. 4/ Thus, it is clear that solids picked up by the water from the hose were being carried into the streamflow of the second unnamed tributary in excessive quantities.

Petitioner maintains that, because OSMRE offered no evidence of upstream samples which would establish the background concentration of suspended solids in the second unnamed tributary (see Tr. 93-94), OSMRE failed to prove that water from the hose was contributing additional suspended solids to the river 5/ (Petitioner's Brief at 9). It is true

4/ Petitioner contends that sample No. 1 is suspect because it was taken a significant distance from the receiving stream and, therefore, does not reflect any "settling out" of suspended solids which would occur before the runoff reached the stream (Petitioner's Brief at 9). However, the amount of settling out which occurred by the time the runoff reached the second unnamed tributary is reflected in the decrease in suspended solids from 6,785 to 759 mg/l, as between sample Nos. 1 and 4. Sample No. 1 is significant because it indicates that water from the hose was picking up solids as it flowed down the road and drainage ditch. Sample No. 4 shows that, even with the settling occurring, the concentration of suspended solids where the water intersected the second unnamed tributary was significantly in excess of the allowable limit.

5/ Petitioner also challenged all of OSMRE's test results as "questionable" because the samples were not "preserved," i.e., they were gathered without

that OSMRE introduced no upstream samples; nevertheless, exhibit 13 is a photograph taken March 29, 1982, of the intersection of the two tributaries. It shows the second unnamed tributary as clear, while the tributary carrying the water from petitioner's access roads is visibly turbid. The turbid water was carried into the river and is reflected in an excessive concentration of suspended solids in sample No. 2 (343 mg/l), which is not accounted for by the background level in the river, as reflected in sample No. 3 (16.1 mg/l). Given OSMRE's exhibit 13, the failure of OSMRE to submit an upstream sample from the second unnamed tributary is not significant.

Thus, we conclude that the evidence establishes that petitioner's access road was not maintained so as to prevent additional contributions of suspended solids to streamflow, in violation of 30 CFR 717.17(j)(1). See Island Creek Coal Co., 1 IBSMA 285, 86 I.D. 623 (1979). Accordingly, we affirm Judge McGuire's September 1986 decision to the extent he affirmed issuance of NOV No. 82-1-36-2.

We turn, therefore, to the question of what is the appropriate civil penalty to be assessed for NOV No. 82-1-36-2. The record indicates that OSMRE assessed a civil penalty in accordance with the point system and conversion table set forth in 30 CFR 723.13 and 723.14. OSMRE assigned a total of 35 points, allocated as follows: probability of occurrence - 14 points; extent of potential or actual damage -

9 points; and negligence - _____

fn. 5 (continued)

acidification (Tr. 104-05) (Petitioner's Brief at 8). However, there was no evidence that the fact that the samples were not preserved had any effect on the test results for suspended solids.

12 points, equating to a civil penalty of \$1,500 (Respondent's Exh. 29

at 4). In his September 1986 decision, Judge McGuire increased the civil penalty to \$2,200 based on his determination that 15 points should have been assigned for both probability of occurrence and extent of potential or actual damage for a total of 42 points.

[2] In its brief, petitioner disputes Judge McGuire's assignment of 15 points for probability of occurrence. This category measures the "probability of the occurrence of the event which [the] violated standard is designed to prevent." 30 CFR 723.13(b)(2)(i). Petitioner argues that a 1-inch hose with a flow restricting nozzle discharging at a point one-quarter mile from the Monongahela River "would have virtually no probability of contributing additional solids to the river" (Petitioner's Brief at 13). The record, however, clearly contradicts that argument. Although the record is not clear regarding the size of the hose, the evidence shows that the cumulative flow from the hose was sufficient on March 29, 1982, to create the flow carrying the suspended solids into the river. Thus, the event which 30 CFR 717.17(j)(1) was designed to prevent did, in fact, occur. Under 30 CFR 723.13(b)(2)(i), 15 points are properly assigned.

[3] Petitioner also disputes the assignment of 15 points for extent of potential or actual damage, contending that no additions of suspended solids to streamflow occurred on or off the permit area. Under 30 CFR 723.13(b)(2)(ii), 0 to 7 points are to be assigned if the damage which the violated standard is designed to prevent would remain within the permit area and 8 to 15 points if it would extend outside the permit area, with the

actual points to be determined according to the duration and extent of the damage. It is clear that, since additional suspended solids were, in fact, contributed to the river as a result of petitioner's access road maintenance practices, damage would extend outside the permit area. However, there was no evidence regarding the extent or duration of the actual or potential damage resulting from the violation observed on March 29, 1982. Although there is evidence that petitioner had been utilizing the sprinkler-type system prior to March 29, 1982, on an as-needed basis (Tr. 151), there is no indication that the volume of water used on other days was such as would have resulted in the same circumstances as occurred on March 29, 1982. Accordingly, only eight points should have been assigned under this category.

Petitioner also disputes the assignment of 12 points for negligence. Under 30 CFR 723.13(b)(3)(i), up to 12 points may be assigned for negligence, with the actual points dependent on the degree of negligence. OSMRE's notice of proposed assessment contained a section entitled "Assessment Explanation." Under the heading of "Negligence," only the number 12 appears without any explanation for that assignment. 6/

Petitioner contends that its actions did not constitute negligence where, according to Bearden, the sprinkler-type system was a reasonable method of controlling fugitive dust (Tr. 154). However, regardless of the

6/ Although there is no explanation for the assignment of 12 points, we note that the March 1980 version of OSMRE's Penalty Assessment Manual provides that the assessor "should always start at twelve (12) points and work down for any moderating circumstances." One of the examples given in the manual of when to assess lower points for negligence is when "the permittee is trying to do something but is doing it wrong."

efficacy of the system as a dust control measure, it had obvious consequences with respect to water quality. OSMRE seeks the imposition of 20 points based on its contention that petitioner's conduct exhibited a greater degree of fault than negligence. We disagree. Where the water from the hose was creating a clearly observable flow of turbid water which eventually entered the river, we must conclude that petitioner's failure to prevent the contribution of additional suspended solids to the river was "due to indifference, lack of diligence, or lack of reasonable care." 30 CFR 723.13(b)(3)(ii)(B). There is no evidence of a greater degree of fault than negligence. Here, petitioner was attempting to address one problem and through inattention it created another. We find that under 30 CFR 723.13(b)(3)(i), the assignment of 12 points was too many; six points are properly assigned.

Finally, petitioner contends that 10 points should be subtracted for petitioner's good faith efforts to abate the violation. Under 30 CFR 723.13(b)(4), between 1 and 10 points may be subtracted for good faith if the person to whom the notice or order issued achieved rapid compliance. "Rapid compliance" means the person took "extraordinary measures" to abate the violation in the shortest possible time and abatement was achieved before the time set for abatement. 30 CFR 723.13(b)(4)(ii)(A). Bearden testified that use of the sprinkler-type system ceased when petitioner received the NOV and the truck-mounted system was purchased and began operation on June 15, 1982, prior to the deadline for abatement originally set in the NOV (Tr. 159, 161-62). Despite this testimony by Bearden, the record shows that on June 17, 1982, OSMRE Inspector Koppe issued a

modification of NOV No. 82-1-36-2 extending the abatement time from June 16 to July 16, 1982 (Respondent's Exh. 28). Koppe testified that the modification was issued as a result of a June 17, 1982, visit to the minesite at which time he communicated with petitioner's staff and was informed that more time for abatement was necessary because "they needed to complete the work with the subcontractor" (Tr. 61).

We do not believe the record supports petitioner's claim of good faith, as defined in the regulations. Although Bearden states that the use of the sprinkler-type system ceased immediately following the receipt of the NOV and that the alternative system was in operation on June 15, 1982, he does not explain why a 30-day extension of the abatement period was necessary. Under the circumstances, no good faith points are warranted.

[4] Therefore, the total number of points that should have been assigned for this violation is 29 (15 for probability of occurrence, 8 for extent of potential or actual damage, and 6 for negligence). Under 30 CFR 723.14, 29 points translates to a civil penalty of \$900. While the Board has the authority to waive the assessment of a civil penalty for a notice of violation where less than 30 points have been assigned (see Lone Star Steel Co. v. OSMRE, 98 IBLA 56, 67 (1987); 30 CFR 723.12(c)), we decline to do so where petitioner was negligent in creating a condition which clearly violates Departmental regulations.

Accordingly, we modify Judge McGuire's decision to the extent he imposed a \$2,200 civil penalty for NOV No. 82-1-36-2. Petitioner is properly assessed a civil penalty of \$900.

Discharges Exceeding Effluent Limitations

OSMRE issued NOV No. 82-I-36-3 to petitioner because discharges from sedimentation pond 004 exceeded numerical effluent limitations for pH and total manganese. Koppe testified that, at the time of his March 31 inspection, he took two water samples in order to judge the quality of the water in and around sedimentation pond 004 (Tr. 69-70). Sample No. 5 was taken at the discharge point for the pond (Tr. 69; Respondent's Exhs. 32 and 34). Koppe testified that the discharge from the pond enters a ditch which diverts water from an old spoil area around the edge of the pond and this water then flows down under the access road, eventually entering the second unnamed tributary and then the Monongahela River (Tr. 67-69, 101). Sample No. 6 was taken from groundwater seepage from the spoil area situated between the active refuse pile and sedimentation pond 004 (Tr. 70; Respondent's Exh. 35). Although at one point Koppe testified that this groundwater seepage was caught in a diversion ditch and carried off the permit area (Tr. 98), he later agreed that seeps from the spoil area would run into a ditch leading to the sedimentation pond (Tr. 101-02). Sample Nos. 5 and 6 were tested and determined to have, respectively, a pH of 4.88 and 4.34 and a total manganese content of 39.7 mg/l and 62.5 mg/l (Tr. 76; Respondent's Exh. 38). Koppe testified that the acceptable limits were no less than 6.0 or greater than 9.0 for pH and a maximum daily limit of 4 mg/l of manganese (Tr. 76).

The applicable regulation cited in the NOV as having been violated, 30 CFR 717.17(a), provides in relevant part that discharges from areas

disturbed by the surface activities of an underground mining operation shall at a minimum meet certain numerical effluent limitations. ^{7/} The maximum allowable limit is within the range of 6.0 to 9.0 for pH and 4 mg/l for manganese. 30 CFR 717.17(a)(3). The discharge from sedimentation pond 004, as reflected in sample No. 5, exceeded both effluent limitations. This would be sufficient to establish a prima facie case of a violation of 30 CFR 717.17(a). See A&S Coal Co. v. OSMRE, 96 IBLA 338, 345-46 (1987).

Petitioner maintains, however, that it is not responsible for the excessive pH and manganese levels in the discharge from sedimentation pond 004. In support thereof, petitioner offered the testimony of Bearden and Robert D. Volkmar, an environmental scientist with Baker TSA, Inc. (Baker), which was hired by petitioner to do an acid seepage study of the Isabella Mine. Bearden testified that the pond was originally built to catch surface runoff from the active refuse pile (Tr. 164) and that a diversion ditch was also constructed at that time "to divert water from the Luzerne

^{7/} "Disturbed area" is defined in the regulations at 30 CFR 701.5 as

"an area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as disturbed until reclamation is complete and the performance bond or other assurance of performance required by Subchapter J of this chapter is released."

(Emphasis in original).

In addition, 30 CFR 717.17(a)(2) provides that:

"For purposes of this section only, disturbed areas shall include areas of surface operations but shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Disturbed areas shall not include those surface areas overlying the underground working unless those areas are also disturbed by surface operations such as fill (disposal) areas, support facilities areas, or other major activities which create a risk of pollution."

strip mine operation off of our permit site, which was known to be bad water, around our treatment facilities" (Tr. 167). Bearden explained that petitioner subsequently constructed another diversion ditch above the first, at OSMRE's direction, in order to catch groundwater seepage from off the permit area south of the active refuse pile and bring it to the inlet of the pond for treatment (Tr. 167-68, 170-73; Petitioner's Exh. 2). Bearden stated that in the ditch line this water was treated with soda ash (Tr. 169).

In an effort to establish the source of this groundwater seepage, petitioner contracted with Baker (Tr. 174-75). Volkmar testified that, in conducting its study, Baker initially did a geophysical survey to determine areas of high conductivity, in order to guide the placement of boreholes (Tr. 187). Boreholes were then drilled in both the active refuse pile and adjacent spoil areas to the north and south in order to extract material and monitor groundwater (Tr. 188). Volkmar explained the location of certain of the boreholes as follows: "Holes MB1 and MB3 and MB7 were placed entirely in spoil material in areas uninfluenced by refuse material. Holes MB4 and MB5 were placed in refuse material. Holes MB2 and MB6 were located such that they would penetrate the refuse material at the surface and go through the spoil material underneath" (Tr. 188). The quality of groundwater in five of the boreholes was tested in samples taken on December 19, 1984, and April 15, 1985, and the results shown on petitioner's exhibits 3 and 4 (Tr. 189). In addition, the Acid Seepage Study, dated April 29, 1985, prepared by Baker is contained in the record and indicates, at pages 21-27, that Baker tested groundwater acid seepage at seven separate sites, identified as sampling points 53-55 and 58-61 on petitioner's exhibit 2. See Acid

Seepage Study at 24. The test results of the seepage indicate a low pH and a high manganese content.

Volkmar also testified that weathering tests were conducted on material taken from the boreholes. The tests consisted of "subjecting samples of the material to actual additions of weathering and measuring the reaction products" (Tr. 193). Volkmar testified that, based on these weathering tests, the refuse material was generally considered to be "relatively non-acid producing," while the spoil material was considered to be a "very significant acid producer" (Tr. 192). He also stated that the manganese content would be higher in acid-producing material (Tr. 194). The relatively low pH and high manganese content of groundwater taken from spoil areas is reflected in petitioner's test results for boreholes MBI, MB3, and MB7 (Petitioner's Exhs. 3 and 4). The acid-producing nature of spoil material, as opposed to refuse material, is reflected on petitioner's exhibits 5 and 6, which are graphs indicating acid production for boreholes MB5 and MB6 (Tr. 193-94). Volkmar testified that it was his opinion that the low pH and high manganese content of the discharge from sedimentation pond 004 was due to "acid seepage out of the spoil material immediately above the * * * pond" (Tr. 195).

In his September 1986 decision, Judge McGuire noted that a permittee is generally responsible for meeting effluent limitations for water discharged from a disturbed area where the water either originated from that area or, having originated from outside the permit area, became commingled with water from the disturbed area, citing Consolidation Coal Co., 4 IBSMA 227, 89 I.D.

632 (1982), and Jeffco Sales & Mining Co., 4 IBSMA 140, 89 I.D. 467 (1982). Judge McGuire held that in order to avoid responsibility for water coming from outside the permit area, a permittee must demonstrate that this water did not become commingled with water originating from the disturbed area. Judge McGuire found in this case that petitioner had failed to do so because

petitioner's evidence demonstrated that it had diverted acid drainage originating on an off-permit area that had been previously mined by Luzerne Coal Company to its sedimentation pond 004, the structure which served its active refuse pile. Once commingled in that manner, the obligation of meeting the applicable effluent limitations was that of petitioner.

(Decision at 7).

In its brief, petitioner contends that it should not be held responsible where the evidence establishes that groundwater seepage from off the permit area originated in spoil areas created by Luzerne and was carried into sedimentation pond 004 by a diversion ditch which petitioner constructed at the request of OSMRE and thus became commingled only because of that action. Petitioner argues that to hold otherwise would be unjust and contrary to the law (Petitioner's Brief at 17).

The pertinent part of the regulation which petitioner is charged with violating, 30 CFR 717.17(a)(3), requires that discharges from areas disturbed by underground operation and by surface operation and reclamation operations conducted thereon comply with regulatory effluent limitations. 8/

8/ The quality of discharges from disturbed areas is measured at "the point at which drainage from the disturbed area leaves the last sedimentation pond

The Department commented concerning essentially the same language in 30 CFR 715.17(a) with respect to surface coal mining and reclamation operations, as follows: "[T]he regulations require application of the effluent limitations only to discharges from the disturbed area and not to discharges from areas the permittee has not disturbed through mining and reclamation. * * * Effluent limitations do not apply to discharges from undisturbed areas." 42 FR 62651 (Dec. 13, 1977).

[5] In accordance with the regulations, a permittee is responsible for all discharges from its disturbed areas and must insure that those discharges meet the effluent limitations, irrespective of the source of the discharges. Cravat Coal Co., 2 IBSMA 249, 255, 87 I.D. 416, 419 (1982). However, a permittee is not accountable for discharges from areas which are not disturbed by it in the course of its operations. Darmac Coal Co., 74 IBLA 100 (1983). Nevertheless, it has been held generally that where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed, the discharge from the sedimentation pond must meet the effluent limitations. Jeffco Sales & Mining Co., 4 IBSMA at 148, 89 I.D. at 472.

The evidence in this case shows a commingling of waters in the sedimentation pond; however, petitioner's position is that the commingling took place only as a result of OSMRE's insistence that the drainage from the

fn. 8 (continued)

through which it is passed." Island Creek Coal Co., 3 IBSMA 383, 399, 88 I.D. 1122, 1130 (1981).

seepage be diverted to the sedimentation pond and that, but for that commingling, the discharge from the sedimentation pond would have met the effluent limitations.

In Jeffco, the Board held that one seeking to show the "inapplicability of the effluent limitations in 30 CFR 715.17(a) to discharges from its sedimentation pond" is in essence claiming an exemption from coverage by the regulations and must affirmatively demonstrate its entitlement thereto, citing Daniel Brothers Coal Co., 2 IBSMA 45, 87 I.D. 138 (1980). 4 IBSMA at 150, 89 I.D. at 473. 9/ Judge McGuire held that petitioner's own evidence, in essence, precluded a ruling in its favor because that evidence showed commingling of water from seep areas with water from disturbed areas. His conclusion was that commingling results in a finding of violation. Such a conclusion is, we believe, too restrictive.

In Consolidation Coal Co., 4 IBSMA at 244, 89 I.D. at 641, the permittee was charged with an effluent violation concerning seepage from the _____
9/ We note that in Jeffco IBSMA found that OSMRE had presented a prima facie case of an effluent violation and that Jeffco "failed to carry its burden of persuasion." 4 IBSMA at 152, 89 I.D. at 474. In Consolidation, IBSMA held that OSMRE made a prima facie showing regarding an effluent violation and that Consolidation "did not rebut this evidence." 4 IBSMA at 244, 89 I.D. at 641. In each of those cases the proceeding was a review proceeding in which the regulations provide that the person seeking review shall have the ultimate burden of proof as to the fact of violation. 43 CFR 4.1171. IBSMA's holding in Jeffco that an applicant for review claiming that the effluent limitations of 30 CFR 715.17(a) are not applicable to discharges from its sedimentation pond bears the burden of proving the facts to support the claim of inapplicability is consistent with 43 CFR 4.1171. Although the present case involves a civil penalty proceeding, in which OSMRE bears, in accordance with 43 CFR 4.1155, the ultimate burden of persuasion as to the fact of violation, petitioner must still demonstrably show entitlement to an exception from responsibility.

base of a refuse pile. The permittee alleged that OSMRE had failed to show that the seepage included any surface drainage from an area disturbed by the permittee. The Board held that the evidence presented by OSMRE, showing that at least part of the drainage from the base of the refuse pile had percolated through the refuse pile from the top surface which had been disturbed by the permittee, established a violation, and that the permittee failed to rebut that evidence. ^{10/} The Board stated, however, that if drainage was proven to be solely from an area not disturbed in the course of the permittee's operations, there would be no liability for the drainage. Id. at 244 n.10, 89 I.D. at 641 n.10.

We conclude, in accordance with the thrust of the Consolidation Coal case, that a person charged with a violation of the effluent limitations may escape liability for such a violation which is based on the discharge from a sedimentation pond where it can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations. We will review petitioner's evidence to determine if it made the necessary showing.

In order to support its position, petitioner hired an experienced consulting firm to define the origin of acid seepage at the minesite in question. The results of that study provide convincing evidence that the spoil areas have groundwater which has a low pH and a high manganese

^{10/} Consolidation was overruled in part not pertinent to the present discussion in Alpine Construction Corp. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988).

content, exceeding acceptable limits, while the refuse disposal material generally does not (see Tr. 193-95; Acid Seepage Study at 39-40). Petitioner's consultant concluded that the source of the low pH, high manganese content discharge from the sedimentation pond was acid seepage from the spoil material immediately above the pond (Tr. 195), and that but for such seepage, he would not expect the discharge to violate the effluent limitations (Tr. 196). The location of seepage from the spoil areas is shown on petitioner's exhibit 2.

On petitioner's exhibit 2, Bearden identified two seep areas as having been diverted into the sedimentation pond (Tr. 171-72). Those were sample point 60 and an area near sample point 58 (see Petitioner's Exh. 2). Petitioner claims that these areas are the sole cause of the low pH and high manganese content of the sample from the sedimentation pond discharge. However, Volkmar's testimony that the effluent violations were due to "acid seepage out of the spoil material immediately above the * * * pond" (Tr. 195), was never directly linked by petitioner to the two seepage areas identified by Bearden. While Volkmar's testimony was clearly general enough to have encompassed those two areas, it also could have included sample points 53-55 and 58-61, all of which were identified as acid seepage areas and could be considered "immediately above the pond" (see Petitioner's Exh. 2).

Moreover, while sample point 53 represents an acid seep area from spoil material, petitioner's exhibit 2 shows the location of that seep area within a disturbed area, i.e., the refuse hollow fill area. In addition, sample

point 54 may also be located in that same area. There is no evidence that seepage from sample points 53 and 54 would not have entered the sedimentation pond. Also, while refuse material generally exhibited a minimal acid production rate in weathering tests, two refuse samples produced significant amounts of acid. Acid Seepage Study at 33-34.

We conclude that petitioner has failed to establish that but for diversion of acid seepage from the two areas identified on petitioner's exhibit 2 into the sedimentation pond, discharges from that sedimentation pond would have met the regulatory effluent limitations. Therefore, we affirm as modified Judge McGuire's decision upholding the violation in NOV No. 82-1-36-3.

We now consider the question of the appropriate civil penalty for NOV No. 82-1-36-3. In assessing a civil penalty, OSMRE assigned a total of 34 points, allocated as follows: probability of occurrence - 13 points; extent of potential or actual damage - 9 points; and negligence - 12 points (Respondent's Exh. 41, at 4). In his September 1986 decision, Judge McGuire affirmed OSMRE's civil penalty assessment of \$1,400.

In its brief, petitioner does not dispute the assignment of points for probability of occurrence, extent of potential or actual damage or negligence. Rather, petitioner contends that it is entitled to points for good faith because it took "extraordinary measures" to abate the violation upon issuance of the NOV, as follows:

Initially, National Mines increased the amount of soda ash treatment by relocating the treatment dispenser [down to the inlet of the pond]. (Tr. 204). Such effort began immediately upon receipt of the Notice of Violation. (Tr. 209). When this effort proved unsuccessful, National Mines determined that the only feasible alternative was to pipe the sedimentation pond discharge to its main treatment plant. (Tr. 204). This required engineering, approval by the Pennsylvania Department of Environmental Resources, and construction. (Pet. Exhibit 7). The construction involved approximately 2,000 feet of pipe and cost over \$14,000. (Tr. 204-209; Pet. Exhibit 8). [Emphasis in original.]

(Petitioner's Brief at 18-19).

Bearden testified that all of the work done in order to pipe the sedimentation pond discharge to petitioner's main treatment plant was completed September 12, 1983, over 1 year after the initial time set for abatement in the modified NOV (Tr. 209). Even assuming that construction of the pipe constituted extraordinary measures, petitioner is not entitled to any points for good faith where petitioner admits that abatement was not achieved "before the time set for abatement," as required by 30 CFR 723.13(b)(4)(ii)(A).

In the alternative, petitioner contends that use of the point system and conversion table should be waived and the civil penalty reduced or eliminated in the interest of equity and fairness. The Board, as well as an Administrative Law Judge, has the authority to waive use of the point system and conversion table. 43 CFR 4.1157(b)(1) and 4.1270(f). However, waiver is permitted only where it would "further abatement of violations of the

Act." ^{11/} 43 CFR 4.1157(b)(1). We find no justification for waiver of the use of the point system and conversion table in this case. Accordingly, the Board is required by 43 CFR 4.1270(f) to use the civil penalty formula set forth in 30 CFR 723.13 and 723.14. Given the points assigned, this translates to a civil penalty of \$1,400 under 30 CFR 723.14. We affirm Judge McGuire's September 1986 decision to the extent that he assessed a civil penalty of \$1,400 for NOV No. 82-1-36-3.

In summary, we affirm that part of Judge McGuire's decision upholding the violation in NOV No. 86-1-36-2 and affirm the imposition of a civil penalty for that violation, but we modify Judge McGuire's decision as to his imposition of a civil penalty of \$2,200, and we assess a civil penalty of \$900. We affirm as modified Judge McGuire's decision to the extent it upheld the violation in NOV No. 82-1-36-3, and we affirm the imposition of the \$1,400 penalty assessed therefor. OSMRE is directed to refund to petitioner, in accordance with 30 CFR 723.20(c), the difference between its prepayment for the proposed civil penalties in this case (\$3,600) and the amount assessed in this decision (\$2,300).

^{11/} The preamble to the proposed rulemaking which became 43 CFR 4.1157(b)(1) indicates that the regulation was intended to accord the same authority to the Administrative Law Judge as was available to the Director, OSMRE, to waive use of the point system and conversion table. 43 FR 15442-43 (Apr. 13, 1978). As expressed in 30 CFR 723.16(a), the Director may waive use of the point system and conversion table where "taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust." Even utilizing that standard, we are not persuaded that the civil penalty is "demonstrably unjust." Petitioner had adequate opportunity to monitor discharges from sedimentation pond 004 and ensure that effluent limitations were met prior to issuance of the NOV. If it believed that acid seepage diverted to the pond at OSMRE's direction would cause or was causing discharges from its sedimentation pond to violate effluent limitations, it should have objected to OSMRE. The record contains no evidence of objection by petitioner.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and affirmed as modified in part.

Bruce R. Harris
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member